IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 55 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)

Versus

VYAS & COMPANY - Respondent(s)

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Appearance :
MR BB NAIK for Applicant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 01/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR. JUSTICE D.A.MEHTA)

1. Income Tax Appellate Tribunal, Ahmedabad Bench “B”, has

referred the following questions under Section 256(1) of the Income Tax Act, 1961 (“the Act”) both at the instance of the revenue and the assessee.

BY DEPARTMENT:

“(1) Whether on the facts and in the circumstances of the case of the assessee and in law, the ITAT was correct and justified in granting 50% reduction out of disallowed secret commission of Rs.5,58,915/- even when the ITAT had reached to the finding of fact that the payment of secret commission was neither fully proved or disproved said huge claim of expenses of Rs.5,58,915/- and thus in law propounding that the burden of proof of an expenditure having been incurred wholly, entirely and necessarily for the purposes of business was not entirely on the assessee but the assessing officer has the burden to disprove the claims and assertions of the assessee that an expenditure has been so incurred.

BY ASSESSEE:

(1) On the facts and in the circumstances of the case, whether the ITAT was right in allowing the claim of the secret commission only to the extent of 50% instead of allowing the

claim in full?”

2. Assessment Year is 1989-90 and the relevant accounting period is commencing from 1st January, 1988, upto 31st March, 1989. The assessee, a partnership firm, carrying on business of dyes and chemicals is an authorised agent i.e., stockist of Sandoz Limited. The assessee claimed deduction a sum of Rs.5,58,915/- being secret commission paid to various parties. The same was disallowed by the assessing officer and the disallowance was confirmed by CIT (Appeals).

3. The assessee carried the matter in appeal before the tribunal. The tribunal accepted the claim of the assessee to the extent of 50 per cent while confirming the disallowance to the extent of balance 50 per cent. Both the revenue and the assessee are in reference against the partial allowance and disallowance respectively.

4. Heard Mr.B.B.Naik, learned Standing Counsel appearing for applicant revenue. Though served, there is no appearance on behalf of the assessee.

5. On going through the impugned order of tribunal, it becomes

apparent that tribunal has recorded various findings of fact after appreciating the evidence on record. It is found that details of sales have been maintained in terms of quantity and quality. Sales and purchases are vouched. The Gross Profit for the year under consideration is higher when compared with Gross Profit of the immediately preceding year. Dealing with the contention of the revenue that other stockists trading in same items of Sandoz Limited have not claimed deduction of any such secret commission, the tribunal has found that the volume of business of other stockists and the assessee has a vast difference. In other words, the volume of assessee's business is greater when compared to the volume of business of other traders. That payment has been directly made by a partner of the assessee firm and the same is duly supported by the vouchers maintained indicating the correctness of the claim made by the assessee. The necessity of paying secret commission has been explained to be cut-throat competition in the market from new entrants whose products are also perhaps as good as Sandoz Ltd., and hence, according to tribunal, the payment has been made from the point of view of a prudent businessman. Lastly, tribunal has found that considering the fact that the assessee had also offered performance discount of Rs.3,76,193/- the claim for secret commission to the tune of Rs.5,41,068/- is on

higher side. The tribunal has, thus, restricted the allowance to 50 per cent of the claim while retaining the disallowance to the extent of balance 50 per cent.

6. In light of the aforesaid findings of fact, after appreciating the evidence on record, recorded by the tribunal, it is not possible to find any infirmity in the impugned order of the tribunal so as to warrant interference. As to what percentage should be arrived at is a question of fact, and there is no material before the court to hold that the ratio adopted by the tribunal is not fair. Once tribunal has, in its own wisdom, on appreciation of the evidence and material on record, come to the conclusion that the expenditure is allowable to the extent of 50 per cent, it is hardly a matter for this Court to interfere. This is the view adopted by this Court in the case of Commissioner of Income-tax Vs. Geskets and Radiators Pvt. Ltd. Reported in (1991) 192 ITR 509. Whether the burden has been discharged or not is primarily a question of fact and in light of the findings of the tribunal, on the facts and in the circumstances of the case, there is no reason to take a different view of the matter.

7. In the result, both the questions, at the instance of revenue and the assessee, are answered in the affirmative i.e., respectively in favour

of assessee and the revenue. Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A. Mehta, J.)

(H.N. Devani, J.)

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